Petition

Office-Supreme Court, U.S.
FILED
JUL 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-174

in the

Supreme Court

of the

United States

OCTOBER TERM 1980

LAZARO PEREZ and MIGDALIA PEREZ, individually and as parents and natural guardians of VLADIMIR PEREZ, a minor,

Petitioners,

vs.

THE BAHAMAS, a foreign state,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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I.

QUESTIONS PRESENTED FOR REVIEW

A.

WHETHER THE DECISION HEREIN SOUGHT TO BE REVIEWED IS IN DIRECT AND EXPRESS CONFLICT WITH THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS IN *UNITED STATES v. POSTAL*, 589 F.2D 862 (5TH CIR. 1979), U.S. CERT. DEN., 100 S.CT. 61 (1979) ON THE SAME POINT OF LAW: DOES THE UNITED STATES NOW ASSERT JURISDICTION OVER A 200-MILE FISHERY CONSERVATION ZONE PURSUANT TO 16 U.S.C. 1811 SO THAT CITIZENS OF THE UNITED STATES INJURED IN THAT ZONE BY AGENTS OF A FOREIGN STATE CAN MAINTAIN A CIVIL ACTION IN A UNITED STATES DISTRICT COURT ON THE BASIS THAT THE TORT OCCURRED "IN THE UNITED STATES."

B.

WHETHER THE INSTANT CAUSE PRESENTS A SUBSTANTIAL FEDERAL QUESTION, WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, TO WIT: HAS CONGRESS INTENDED PROTECTION OF UNITED STATES CITIZENS AND DEMONSTRATED AN INTENTION TO ACQUIRE JURISDICTION OVER A FISHING ZONE 200 MILES INTO THE OCEAN WHEN IT PASSED THE FISHERY CONSERVATION ACT OF 1976, PUBL. L. NO. 94-765, 90 STAT. 331, 16 U.S.C. 1811.

II.

INTRODUCTION/LISTING OF PARTIES

The petitioners, LAZARO PEREZ and MIGDALIA PEREZ, individually and as parents and natural guardians of VLADIMIR PEREZ, a minor, were the appellants in the court below and were the plaintiffs in the trial court. The respondent, THE BAHAMAS, a foreign state, was the appellee in the court below and was the defendant in the trial court. In this Petition for Writ of Certiorari the parties will be referred to as the Petitioner and the Respondent and, alternatively, by name. The symbol "A" will be used to designate the Petitioner's rule-required appendix which accompanies this Petition. All emphasis has been supplied by counsel unless indicated to the contrary.

III.

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V.

REFERENCE TO REPORTS AND OPINIONS

The opinion of the United States Court of Appeals for the District of Columbia Circuit (unreported) herein sought to be reviewed appears in the appendix to this petition. (A. 1).

VI.

JURISDICTIONAL STATEMENT

The judgment/opinion of the lower court was entered on April 28, 1981 (A. 1). Certiorari has been instituted pursuant to 28 U.S.C. 1254 (1).

The petitioner believes this Court should exercise its certiorari jurisdiction, grant certiorari and review this case on the merits as there appears to now be:

A. Conflict amongst the circuits on the point of law involved; and

B. A substantial federal question presented.

VII.

RELEVANT STATUTES

The instant cause presents for this Court's review and interpretation two Congressional enactments. The first is the Foreign Sovereign Immunities Act of 1977.

(28 U.S.C., §§1330, 1602, et seq). The second is the Fishery Conservation and Management Act. (16 U.S.C. 1801-1822). (A. 4).

The Foreign Sovereign Immunities Act (FSIA) gives to the United States District Courts original jurisdiction of *any* nonjury civil action against a foreign state as to any claim for relief with respect to which the foreign state is not entitled to immunity either under §1605-1607 (FSIA) or any applicable international agreement. 28 U.S.C., §1330 A. 4).

Congress, in enacting FSIA, recognized, as stated at 28 U.S.C. 1602 (A. 4):

> "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."

In determining the general exceptions to the jurisdictional immunity of a foreign state, it is stated at 28 U.S.C. 1605(a)(5) (A. 4):

> "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case—
>
> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, *occurring in the United States* and ca··ed by the tortious act or omission of

> that foreign state or of any official or employee of that foreign state, while acting within the scope of his office or employment . . "

In defining the "United States" Congress, at 28 U.S.C., §1603(c) (A. 4), specifically stated:

> "(c) The 'United States' includes all territory and waters, continental or insular, *subject to the jurisdiction of the United States.*"

At 16 U.S.C. 1811 (A. 4) Congress established a zone contiguous to the territorial sea of the United States, to be known as the Fishery Conservation Zone. Congress determined an inner boundary of the Fishery Conservation Zone and provided that the *outer boundry* of such zone:

> "is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured." (A. 4)

VIII.

STATEMENT OF THE CASE AND FACTS

On or about August 11, 1978, while approximately 60 miles from the Florida east coast, the United States flag vessel, Isabel-FL 3526 SF—a registered or certified fishing vessel—owned by Felix Perez, a United States citizen—was attacked and machine-gunned by Bahamian gunboats. Minor plaintiff, Vladimir Perez, while in the Isabel's cabin, was shot in the head when at least one of the bullets pierced the vessel's exterior. Vladimir Perez is now almost totally blind and paralyzed as a direct result of brain damage caused by the bullets. (A. 3).

The plaintiff commenced this action and in an amended complaint alleged in essence and pertinent part:

* * *

> "4. On or about the 11th day of August, 1978, while approximately sixty miles from the Florida East Coast, the United States flag, and/or registered or certified fishing vessel ISABEL-FL 3526 SF, home port Miami, Florida, U.S.A., was attacked and machine-gunned by the Defendant's gun boats, Flamingo, Inagua and Abaco.
>
> 5. Defendant's agents, servants and/or employees, while acting within the scope of their agency, service and/or employment, negligently machine-gunned VLADIMIR PEREZ, aboard the ISABEL, so that he was struck in the head and/or other parts of his body.

6. At all times material hereto, the United States fishing vessel, ISABEL, was on waters subject to the exclusive jurisdiction of the United States, by virtue of 16 U.S.C. 1811-1822 and by virtue of 18 U.S.C. 7.

7. At all times material hereto, the Defendant has, pursuant to the Crown Proceedings Act of 1964, or otherwise, waived its sovereign immunity and/or has no sovereign immunity in tort with respect to the claims made herein.

8. At all times material hereto, the actions of Defendant, as previously described, was a commercial activity by reason of the following:

a. The Defendant has sought, by gunboat actions, to prevent non-Bahamians from commercial fishing in certain sectors of the United States' fishing waters, as part of an overall plan or scheme to maintain exclusive commercial control over fish and lobsters for Defendant, and its licensed fishing vessels, for economically advantageous reasons. Non-Bahamians are not permitted to obtain fishing licenses to own or operate vessels for fishing under Defendant's rules. As such, the Defendant has created a fishing monopoly by force even though it involves United States waters.

b. Defendant has seized United States fishing vessels, equipment and traps, in order

to keep them for its own purpose or to sell them for Defendant's own financial gain.

c. As part of this overall policy of Defendant to maintain a wrongful fishing monopoly, Defendant has purchased and outfitted gunboats such as the Flamingo.

9. At all times material hereto, the actions of the Defendant have had a direct effect in Florida by reason of the following:

a. The owners and operators of the United States fishing vessels, fearing for their own physical safety and the safety of their property have been intimidated from fishing in the United States' fishing waters by Defendant's gunboat tactics.

b. The Plaintiff, VLADIMIR PEREZ, is presently requiring medical, hospital and nursing assistance in the United States which is costing far in excess of Plaintiff's financial abilities, and as such, Plaintiff is or shall become financially dependent for his care on United States public or United States Government sources.

10. At all times material hereto, the negligent actions of the Defendant, as previously described, were not the exercise or performance or the failure to exercise or perform a discretionary function.

11. Defendant was negligent in causing injury to Plaintiff, VLADIMIR PEREZ, by reason of the following:

a. Failure to have a properly trained crew.

b. Failure to have in effect proper procedures to be utilized in anticipated encounters at sea.

c. Failure to have properly trained gunners.

d. Failure to properly mark Defendant's gunboats.

e. Failure to have a public address system on Defendant's gunboats.

f. Use of excessive force under the circumstances.

g. By violating Plaintiff's vessel the right of innocent passage.

h. Defendant's defense force abused its power and overexceeded its authority.

i. Improper orders of superior officers.

j. Other acts of negligence which will be shown at trial.

12. At all times material hereto, Defendant, by and through their agents, servants and/or employees, violated 18 U.S.C. 1113, 1651, 1653, 1656, 1658, 1659 and 1660 by reason of the following:

a. Assaulting and attempting to murder VLADIMIR PEREZ, by shooting him.

b. Committing acts of piracy against the vessel ISABEL and her crew and passengers.

c. Converting the vessel ISABEL, and the personal property aboard the vessel.

e. Attacking or setting upon the vessel ISABEL to plunder the vessel or to despoil its owner of money, goods or merchandise aboard the vessel.

f. Receiving and accepting pirated property.

g. Boarding the vessel ISABEL without authorization or permission.

h. Other acts to be shown at trial.

13. As a result of Defendant's negligence and violations of law, the Plaintiff, VLADIMIR PEREZ, has suffered severe injuries to his body and extremities, aggravated pre-existing conditions, has in the past and will in the future

> suffer extreme mental and physical pain and anguish and his working ability has been impaired. The injuries are either permanent or continuing in nature. In addition, Plaintiff, VLADIMIR PEREZ, has been almost totally paralyzed and blinded due to permanent brain damage. His condition is permanent and as such he will require medical, nursing and custodial care for the rest of his life." (A. 6-10).

The defendant filed motions to dismiss for lack of subject matter jurisdiction pursuant to 28 U.S.C., Section 1330(a) and lack of personal jurisdiction pursuant to Section 1330(b). The trial court granted the motions and in an extensive memorandum order concluded:

> "Plaintiffs have failed to show how the Bahamas fits into any of the exceptions to the immunity granted all foreign States by the FSIA. Accordingly, this Court lacks jurisdiction over this action and defendant's motion to dismiss for lack of jurisdiction is granted. An order consistent with this memorandum follows." (A. 2).

In due course the plaintiff appealed to the United States Court of Appeals for the District of Columbia Circuit. That Court affirmed the dismissal of the Plaintiff's Amended Complaint. [A. 1]. The opinion entered by that Court forms the basis for this proceeding.

IX.

REASONS FOR GRANTING THE WRIT—ARGUMENT THEREON

The Foreign Sovereign Immunity Act (FSIA) gives to the United States District Courts original jurisdiction of *any* nonjury civil action against a foreign state as to any claim for relief with respect to which the foreign state is not entitled to immunity either under Sections 1605-1607 (FSIA) or under any applicable international agreement. That the instant Respondent is a foreign state and that the instant cause of action validly exists in law is not and has not been an issue.

Congress, in enacting FSIA, recognized, as stated at 28 U.S.C. 1602 [A. 4]:

> "Claims of foreign states to immunity should henceforth be decided by the Courts of the United States and of the state in conformity with the principles set forth in this Chapter."

In determining the general exceptions to the jurisdictional immunity of a foreign State, is as stated at 28 U.S.C. 1605(a)(5) [A. 4]:

> "(a) A foreign State shall not be immune from the jurisdiction of court of the United States or of the States in any case—
>
> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign State for personal

> injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign State, while acting within the scope of his office or employment . . ."

In defining the "United States" Congress, at 28 U.S.C., Section 1603(c) [A. 4], specifically stated:

> "(c) The 'United States' includes all territory and waters, continental or insular, *subject to the jurisdiction of the United States.*'

It appears from the above that the respondent would not be immune from suit if this Court concluded the incident took place in the "United States." It is this unanswered question which provides the basis for both "conflict" and for a "substantial federal question."

At the time of this incident the United States was claiming and therefore *had jurisdiction* over events occurring within 200 miles as long as the events occurred on:

> ". . . territory and waters, continental or insular, subject to the jurisdiction of the United States." 28 U.S.C., §1603(c) [A. 4].

The above referenced section provides that a foreign state is not entitled to immunity (i.e., is subject to suit in a United States District Court) for incidents occurring within the United States. 16 U.S.C. 1811 evidences Congressional intent to, and in fact does, claim jurisdiction over 200 nautical miles (the Fishery Conservation Zone).

Further, it should be noted at this juncture that Congress, at 16 U.S.C. 1801(a) found:

> "(3) Commercial and recreational fishing constitutes a majur source of employment and contributes significantly to the economy of a nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been *badly damaged* by the over fishing of fishery resources at an ever-increasing rate over the past decade. The *activities of massive foreign fishing* fleets in waters adjacent to such coastal areas have contributed to such damage, *interfered with domestic fishing efforts*, and *caused destruction* of the fishing gear of United States fishermen.
>
> (4) International fishery agreements *have not* been *effective* in preventing or terminating the over fishing of these valuable fishery resources. There is *danger* that irreversible effects from over fishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified and implemented." (A. 4).

Congressional findings in this regard are compelling. Congress recognized international agreements (regarding fishing rights) have been ineffective. Congress sought to protect United States citizens and United States fishing rights from foreign encroachment. One of the avowed purposes of the Act was:

> "(1) To take *immediate action* to conserve and *manage* the fishery resources found off the coasts of the United States—by establishing (a) a fishery conservation zone within which the United States will assume exclusive fishery management—" 16 U.S.C. 1801(b) [A. 20].

To foster the purpose—yet, retain the status quo of other territorial areas—Congress expressed a policy [16 U.S.C., Section 1801(c)] to not interfere with and not to change existing territory or other ocean jurisdiction of the United States for all purposes:

> ". . . *other than* the conservation and management of fishery resources, as provided for in this Chapter . . ." 16 U.S.C., Section 1801(c)(2).

Congress has expressed an intent to maintain United States jurisdiction over this 200 mile zone as it relates to fishing rights in the waters. To accomplish the purpose and to implement policy, Congress established this 200 mile zone.

The zone itself is clearly (territory and) water subject to the jurisdiction of the United States. As such this incident occurred within the United States as contemplated in 28 U.S.C. 1602, et seq. Conflict exists herein because in *United States v. Postal, supra*, the Court made an observation which is directly contrary to the conclusion reached by the lower courts in this case. In *United States v. Postal, supra*, the Court stated:

> "We think it significant that the United States now asserts a 200 mile Fishery Conservation Zone, which was established by the Fishery Conservation Act of 1976 (citation omitted) . . .
>
> This Act, of course, supersedes the conventions we construe today, whether self-executed or not, because it came into force subsequent to them . . . but we do think it clear evidence of the consistent policy of the United States in asserting jurisdiction for limited purposes *even beyond* the 12-mile limit and *even in the absence* of treaty." 589 F.2d at p. 880.

Examination of the subject statutes has established that Congress intended protection of United States citizens and demonstrated an intention to acquire jurisdiction over the fishing zone for 200 miles into the ocean. For that reason alone this Court should take jurisdiction of the subject cause and quash the decision herein sought to be reviewed. To that extent, conflict exists between the instant cause and *United States v. Postal, supra.*

Regarding the substantial federal question (which has not yet been decided by this Court) it must be recognized that Congress, knowing there existed ineffective treaties, recognizing United States citizens were being terrorized by encroaching foreign powers, being further aware that State Department action—although well intentioned—is slow, Congress passed a law extending United States territory and waters for

200 miles. As a matter of interest (without legal significance—although definitely with practical significance) the Bahamas also claims 200 miles "out" into the ocean. What the Bahamas passed to protect itself and what Bahamian agents and employees did in gunning down minor plaintiff may—in Bahamian diplomatic circles—be justified, necessary and proper. To this extent the State Department can, at its leisure, resolve this 200-mile dispute. However, it is not for any court to justify Bahamian conduct or to resolve the 200-mile dispute. It is, however, for this Court to interpret federal law—consistent with the intent of Congress—to assure that United States citizens are guaranteed those benefits which Congress attempted to bestow. To effectuate that purpose Congress removed from State Department control and gave to the courts the ability to determine sovereign immunity exceptions. See, for example: *National American Corporation v. Federal Republic of Nigeria, et al*, 448 F.Supp. 622 (U.S.D.C., S.D.N.Y. 1978), affirmed 597 F.2d 314 (2d Cir., 1979) wherein the Court recognized:

> "The uncertain state of the law regarding the amenability of foreign states to suit in personam and the circumstances under which the defense of sovereign immunity would be recognized led to the adoption of the Foreign Sovereign Immunities Act of 1976, which became effective January 19, 1977. (citation omitted). The objectives of the Act were to codify the restrictive theory of sovereign immunity, *to transfer from the Department of State to the Courts in all cases* the determination of whether sovereign immunity should be recognized and

> to provide a comprehensive procedure for the maintenance of suit in personam against foreign states and their agencies. (citations omitted)." 448 F.2d at p. 638.

The motivating factor (or at least one of the motivating factors) had to be predicated upon Congressional realization that the individual rights and liberties of United States citizens sometimes become caught up in the "diplomacy syndrome" and that this could have less of a chance of happening if the decision to determine sovereign immunity exceptions was left to the courts.

There are two statutes pertinent herein. They both serve to protect United States citizens and United States interests. The construction of the Fishery Conservation Act of 1976 has been made by the court in *United States v. Postal, supra.* In the instant cause a construction has been made of the same statute and it is in direct conflict with that found in *United States v. Postal, supra.*

A substantial federal question is also presented in construing the Foreign Sovereign Immunities Act. To allow the opinion herein sought to be reviewed to stand would be to allow the Bahamas to require that this paralyzed, blinded, minor petitioner turn to Bahamian courts to obtain redress for Bahamian wrongful conduct where the Bahamas gunned down the minor petitioner because *it believed* encroachment of *its jurisdiction* occurred. To allow this result would constitute a travesty of justice and would leave United States citizens with no realistic or practical redress while a foreign state once again scoffs at United States citizens handcuffed

by the very laws enacted to insure their rights. Why the United States deemed it necessary to claim "territory" out into the ocean for over 200 miles is of no significance herein. Congress determined a need existed to do so. The events occurred in the "United States." The United States Court of Appeals in and for the District of Columbia Circuit should have so found. This Court should take jurisdiction of the instant cause and enter its writ of certiorari. This Court should quash the decision herein sought to be reviewed and should reverse the final judgment appealed, with directions that the instant cause proceed to a jury trial on all issues.

X.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the petitioner respectfully urges this Honorable Court to take jurisdiction of the instant cause, to review the instant cause on the merits, to quash the opinion herein sought to be reviewed, and to enter such other relief as this Court deems advisable under the circumstances.

Respectfully submitted,

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and
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(305) 358-0427

BY: _____
Arnold R. Ginsberg

XI.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was served, by mail, this 23rd day of July, 1981 on: EDWARD A. McDERMOTT, ESQ. of HOGAN AND HARTSON, 815 Connecticut Avenue, N.W., Washington, D.C. 20006, Attorneys for Respondent, the Bahamas.

_____

Arnold R. Ginsberg

Appendix

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, DATED APRIL 28, 1981 ..... A-1

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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1215

LAZARO PEREZ and MIGDALIA PEREZ,
individually and as parents
and natural guardians of
VLADIMIR PEREZ, a minor,

Appellants

v.

THE BAHAMAS, a foreign state

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 79-2181)

Argued March 2, 1981
[Judgment entered this date]

Decided April 28, 1981

Arnold R. Ginsberg with whom *James E. Burk* was on the brief for appellants.

William A. Bradford, Jr. with whom *Edward A. McDermott* and *Allan D. Windt* were on the brief for appellee.

Before: MACKINNON and WALD, *Circuit Judges*, and AUBREY E. ROBINSON, JR., *District Judge**

Opinion for the Court filed by AUBREY E. ROBINSON, JR., *District Judge.*

AUBREY E. ROBINSON, JR., *District Judge:* This is an appeal from the District Court's dismissal of a tort action against the Government of the Bahamas. The lower court held that it lacked subject matter and personal jurisdiction under 28 U.S.C. §1330 (1976), which is predicated upon the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1602-1611 (1976). The FSIA exception relied upon by Appellant is clearly inapplicable to this case. Accordingly, we affirm.

I

Appellant Perez was a minor aboard a United States fishing vessel in the territorial waters of The Bahamas and was severely injured by a gunshot when Bahamian governmental gunboats fired on the fishing vessel. Suit was commenced against the Government of The Bahamas in the United States District Court for the Southern District of Florida for damages resulting from Appellant's injury. The case was transferred to the District Court for the District of Columbia pursuant to the special

*Sitting by designation pursuant to 28 U.S.C. §292(a) (1976).

venue provision applicable to actions brought against a foreign state. *Id.* §1391(f)(4). The District Court construed our statute to hold that The Bahamas was immune from suit since Appellant had failed to show how the facts of the case triggered any of the statutory exceptions to sovereign immunity. As a result, the District Court dismissed Appellant's complaint since it lacks subject matter or personal jurisdiction when a foreign sovereign is immune from suit. *Id.* §1330.

The provision of the Foreign Sovereign Immunities Act principally at issue in this case provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> > (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, *occurring in the United States* and caused by the tortious act or ommission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; . . .

28 U.S.C. §1605(a)(5) (1976) (emphasis added). A related provision is the definitional section of the FSIA, which specifies that

> [t]he 'United States' includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

Id. §1603(c).

Appellant would have us hold that the shooting incident in this case occurred "in the United States" since, he argues, it occurred within the 200-mile wide Fishery Conservation Zone established by Congress in Fishery Conservation and Management Act of 1976. 16 U.S.C. §§1801-1882 (1976). Alternatively he argues that the shooting occurred within an area subject to the special maritime jurisdiction of the United States established for purposes of criminal law enforcement, 18 U.S.C. §7 (1976), and thus occurred "in the United States."

II

We need not reach the question of whether territory subject to the limited jurisdiction of the United States for circumscribed purposes of fishery conservation or of law enforcement is territory of the United States, sufficient to strip a foreign sovereign of its immunity from tort actions in United States Courts.[1] The shooting

---

[1]It is doubtful that territory falling within the Fishery Conservation Zone suffices as territory of the United States within the meaning of the FSIA. The Fishery Conservation Management Act explicitly provides that it was Congress' intent to "maintain without change the existing territorial or other ocean jurisdiction of the United States for *all purposes* other than the conservation and management of fishery resources." 16 U.S.C. §1801(c)(1) (emphasis added). The language of the statute makes it clear that it was the

incident involved in this case occurred less than a half mile from an island of The Bahamas, the Great Isaac Cay, in Bahamian territorial waters. Even if Appellant's theories are accepted, the tort did not occurr in the United States. The Bahamas is immune from suit in our courts for torts occurring outside the United States. *But see* 28 U.S.C. §1605(a)(3).

The Secretary of State, pursuant to the authority given him by the Fishery Conservation Management Act, 16 U.S.C. §1822 (1976), declared the limit of the Fishery Conservation Zone, insofar as The Bahamas is concerned, to be the median line halfway between the United States and The Bahamas. 42 Fed. Reg. 12937-38 (1977). It is undisputed that the events in this case took

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(Footnote 1 Continued)

intent of Congress to extend United States jurisdiction beyond our territorial seas only for the purpose of conserving and managing scarce marine resources. *See United States v. Postal*, 589 F.2d 862, 880 n. 30 (5th Cir. 1979); Note, *Fishery Conservation & Management Act of 1976: An Accommodation of State, Federal and International Interests* 10 J. Int'l Law 703, 735 (1978). Indeed, if the Fishery Conservation Zone is used as a device to obtain personal and subject matter jurisdiction over foreign sovereigns in civil suits unrelated to the purposes of the Fishery Act, international law may be violated. Publicist Ian Brownlie observed:

> Excessive and abusive assertion of civil jurisdiction could lead to international responsibility or protests at *ultra vires* acts. Indeed, as civil jurisdiction is ultimately reinforced by procedures of enforcement involving criminal sanctions, there is in principle no great difference between the problems created by assertion of civil and criminal jurisdiction over aliens.

I. Brownlie, *Principles of Public International Law* 299 (1979).

place well beyond the median line, in the territorial waters of The Bahamas and outside the Fishery Conservation Zone. This placement by the Secretary of State of the area in question beyond the United States Fishery Conservation Zone is dispositive of Appellant's principal contention. Appellant's argument that a tort committed in the Fishery Conservation Zone is a tort "occurring in the United States" is thus not supported by the facts of this case.

Perez also relies upon 18 U.S.C. §7(1) but that statute defines the "special maritime and territorial jurisdiction of the United States" only for purpose of the title dealing with United States crimes. Also, the only waters subject to the United States' special maritime jurisdiction are "high seas", 18 U.S.C. §7(1) (1976), and territorial waters of a nation are not part of the "high seas". *See, e.g.*, Convention on the High Seas, Article I, T.I.A.S., 13 U.S.T. 2312; *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 338 n. 14 (5th Cir. 1978); *United States v. Mitchell*, 553 F.2d 996, 1005 n. 15 (5th Cir. 1977). *Cf. United States v. Flores*, 289 U.S. 137 (1933) (acts committed by U.S. citizens on U.S. vessels in territorial waters of another sovereign are subject to criminal jurisdiction of U.S. Courts). Appellant's injuries were not suffered on the high seas but, rather, were inflicted within Bahamian territorial waters. Therefore, the special maritime jurisdiction is in no way involved here and we need not reach the question of its applicability to jurisdictional determinations under the FSIA.

Appellant has failed to demonstrate how Section 1605 (a)(5), or any of the statutory exceptions to sovereign

immunity, are applicable to The Bahamas in this case. The Government of The Bahamas is entitled to the sovereign immunity granted it by statute, 28 U.S.C. §1604 (1976), and the lower court was correct in dismissing this action.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-4110-Civ-CA

AT LAW AND IN ADMIRALTY

LAZARO PEREZ and MIGDALIA PEREZ, individually and as parents and natural guardians of VLADIMIR PEREZ,

Plaintiffs,

vs.

THE BAHAMAS, a foreign state,

Defendant.

AMENDED COMPLAINT

(Filed February 2, 1979)

Plaintiffs sue the Defendant and allege:

1. Jurisdiction is based upon Admiralty and Maritime Law, and 28 U.S.C. 1605-1607, 1330, and 18 U.S.C. 7, 1113, 1651, 1653, 1656, 1658, 1659 and 1660.

2. At all times material hereto, LAZARO and MIGDALIA PEREZ, are the parents and natural guardians of VLADIMIR PEREZ, a minor. All of them are residents of Dade County, Florida.

3. At all times material hereto, the Defendant is a foreign state which maintains a consulate office in Miami, Dade County, Florida.

4. On or about the 11th day of August 1978, while approximately sixty miles from the Florida East Coast, the United States flag, and/or registered or certified fishing vessel ISABEL-FL3526 SF, home port Miami, Florida, U.S.A., was attacked and machine gunned by the defendant's gun boats, Flamingo, Inagua and Abaco.

5. Defendant's agents, servants and/or employees, while acting within the scope of their agency, service and/or employment, negligently machine gunned VLADIMIR PEREZ, aboard the ISABEL, so that he was struck in the head and/or other parts of his body.

6. At all times material hereto, the United States fishing vessel, ISABEL, was on waters subject to the exclusive jurisdiction of the United States, by virtue of 16 U.S.C. 1181-1822 and by virtue of 18 U.S.C. 7.

7. At all times material hereto, the Defendant has, pursuant to the Crown Proceedings Act of 1964, or otherwise, waived its sovereign immunity and/or has no sovereign immunity in tort with respect to the claims made herein.

8. At all times material hereto, the actions of Defendant, as previously described was a commercial activity by reason of the following:

a. The Defendant has sought, by gunboat actions, to prevent non-Bahamians from commercially fishing in certain sectors of the United States' fishing waters, as part of an overall plan or scheme to maintain exclusive commercial control over fish and lobsters for Defendant, and its licensed fishing

vessels, for economically advantageous reasons. Non Bahamians are not permitted to obtain fishing licenses to own or operate vessels for fishing under Defendant's rules. As such, the Defendant has created a fishing monopoly by force even though it involves United States waters.

b. Defendant has seized United States fishing vessels, equipment and traps, in order to keep them for its own purpose or to sell them for Defendant's own financial gain.

c. As part of this overall policy of Defendant to maintain a wrongful fishing monopoly, Defendant has purchased and outfitted gunboats such as the Flamingo.

9. At all times material hereto, the actions of the Defendant have had a direct effect in Florida by reason of the following:

a. The owners and operators of United States fishing vessels, fearing for their own physical safety and the safety of their property have been intimidated from fishing in the United States' fishing waters by Defendant's gunboat tactics.

b. The Plaintiff, VLADIMIR PEREZ, is presently requiring medical, hospital and nursing assistance in the United States which is costing far in excess of Plaintiff's financial abilities, and as such, Plaintiff is or shall become financially dependent for his care on United States public or United States Government sources.

10. At all time material hereto, the negligent actions of the Defendant, as previously described, were not the exercise or performance or the failure to exercise or perform a discretionary function.

11. Defendant was negligent in causing injury to Plaintiff, VLADIMIR PEREZ, by reason of the following:

a. Failure to have a properly trained crew.

b. Failure to have in effect proper procedures to be utilized in anticipated encounters at sea.

c. Failure to have properly trained gunners.

d. Failure to properly mark Defendant's gunboats.

e. Failure to have a public address system on Defendant's gunboats.

f. Use of excessive force under the circumstances.

g. By violating Plaintiff's vessel the right of innocent passage.

h. Defendant's defense force abused its power and over exceeded its authority.

i. Improper orders of superior officers.

j. Other acts of negligence which will be shown at trial.

12. At all times material hereto, Defendant, by and through their agents, servants and/or employees,

violated 18 U.S.C. 1113, 1651, 1653, 1656, 1658, 1659 and 1660 by reason of the following:

a. Assaulting and attempting to murder VLADIMIR PEREZ, by shooting him.

b. Committing acts of piracy against the vessel ISABEL and her crew and passengers.

c. Converting the vessel ISABEL and the personal property aboard the vessel.

e. Attacking or setting upon the vessel ISABEL to plunder the vessel or to despoil its owner of money, goods or merchandise aboard the vessel.

f. Receiving and accepting pirated property.

g. Boarding the vessel ISABEL without authorization or permission.

h. Other acts to be shown at trial.

13. As a result of Defendant's negligence and violations of law, the Plaintiff, VLADIMIR PEREZ, has suffered severe injuries to his body and extremities, aggravated pre-existing conditions, has in the past and will in the future suffer extreme mental and physical pain and anguish and his working ability has been impaired. The injuries are either permanent or continuing in nature. In addition, Plaintiff, VLADIMIR PEREZ, has been almost totally paralyzed and blinded due to permanent brain damage. His condition is permanent and as such, he will require medical, nursing and custodial care for the rest of his life.

14. It is reasonably anticipated that LAZARO and MIGDALIA PEREZ, absent a recovery in this action, will not be financially able to provide the care needed by their son for his injuries, and as such, the expenses will be a charge to VLADIMIR PEREZ or his estate.

CLAIMS OF LAZARO AND MIGDALIA PEREZ

Plaintiffs, LAZARO PEREZ and MIGDALIA PEREZ, reallege and reaver paragraphs one through fourteen as if set out in full herein.

15. As a further direct and proximate result of Defendant's negligence, the Plaintiff, LAZARO and MIGDALIA PEREZ, have incurred medical expenses in the care and treatment of their son's injuries and the Plaintiff have in the past and will in the future be liable for said medical bills.

16. The Plaintiffs, LAZARO and MIGDALIA PEREZ, have suffered the loss of the services of their son, VLADIMIR, as a result of Defendant's negligence.

WHEREFORE, Plaintiffs demand judgment against Defendant for damages in excess of Fifteen Million ($15,000,000.00) Dollars.

I HEREBY CERTIFY that a true copy of the foregoing has been mailed to James C. Blecke, Esquire, Blackwell, Walker, Gray, et al., Attorney for Defendant,

2400 First Federal Building, Miami, Florida 33131, this 2nd day of February 1979.

Law Offices of Charles R. Lipcon
Attorney for Plaintiffs
Suite 2262, One Biscayne Tower
Miami, Florida 33131
Telephone: 373-3016

By /s/ Charles R. Lipcon

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2181

LAZARO PEREZ, et al.,

Plaintiffs,

vs.

THE BAHAMAS,

Defendant.

ORDER

(Filed January 25, 1980)

Upon consideration of defendant's motion to dismiss, memoranda filed by both parties, and oral argument of counsel, it is by the Court this 25th day of January 1980

ORDERED that defendant's motion to dismiss for lack of jurisdiction is granted.

/s/ John Lewis Smith, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2181

LAZARO PEREZ, et al.,

Plaintiffs,

vs.

THE BAHAMAS,

Defendant.

MEMORANDUM

(Filed January 25, 1980)

The parents of Vladimir Perez, a minor, bring this action for money damages for injuries their son sustained in 1978 when defendant's marine police craft fired on the fishing boat Isabel, which is registered in the United States. The incident occurred somewhat less than half a mile from the Great Isaac Cay in The Bahamas. Jurisdiction is predicated on the Foreign Sovereign Immunities Act of 1977 (FSIA) (28 U.S.C. §§1330, 1605-1607), and the special admiralty and maritime jurisdiction set forth in 18 U.S.C. §§7 (admiralty and maritime jurisdiction), 1113 (attempted murder), 1651 (piracy), 1653 (aliens as pirates), 1656 (conversion of vessel), 1658 (corruption of seamen and confederating with pirates), 1659 (plunder of distressed vessel), and 1660 (attack to plunder vessel). The matter is before the Court on defendant's motion to dismiss for lack of subject matter jurisdiction under 28 U.S.C. §1330(a) and lack of personal jurisdiction under §1330(b).

The Bahamas is a foreign state, 28 U.S.C. §1603(a), and therefore entitled to immunity from the jurisdiction of the courts of the United States unless one of the exceptions in sections 1605-1607 of the Act applies, or unless some international agreement to which the United States was a party at the time of the enactment of the Act otherwise provides. (28 U.S.C. §1604). Plaintiff contends that several section 1605 exceptions apply.

Section 1605(a)(1) provides that a sovereign may waive its immunity either explicitly or implicitly. Plaintiffs argue that defendant waived its sovereign immunity when it adopted the Crown Proceedings Act. This Act, however, opens the courts of The Bahamas to suits against the Bahamian government; it creates no right to bring The Bahamas before the courts of the United States. "[A]ll civil proceedings by or against the Crown shall be instituted and proceeded with in the Supreme Court and in accordance with the rules of court and not otherwise." Crown Proceedings Act, 1963, c. 10. The Bahamas has not waived its immunity by virtue of the Crown Proceedings Act.

Section 1605(a)(2) provides that a sovereign shall not be immune in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes

a direct effect in the United States. 28 U.S.C. §1605(a)(2).

The commercial character of an activity is to be determined by the nature of the act or course of activity and not by reference to its purpose. 28 U.S.C. §1603. Police enforcement of Bahamian fishing law does not become commercial because it may have some commercial purpose or goal. The commercial activity exception does not apply.

Section 1605(a)(5) provides that a sovereign shall not be immune in a case for money damages for personnel injuries "occurring in the United States and caused by the tortious act or omission of that foreign state." 28 U.S.C. §1605(a)(5). The son of the plaintiffs in this action, while aboard a United States registered fishing boat, was allegedly struck by a bullet fired from a Bahamian police boat, approximately 0.41 miles from Great Isaac Cay. Plaintiffs advance two interpretations in an effort to place this event "in the United States" for jurisdictional purposes. First, 18 U.S.C. §7 grants special admiralty or maritime jurisdiction to the United States over the "high seas," or over "any other waters within the admiralty and maritime jurisdiction of the United States." Second, the same section grants jurisdiction over any vessel of the United States found upon the "high seas."

Plaintiffs first argue the "any other waters" provision, contending that the Fishery Conservation and Management Act of 1976 (16 U.S.C. §§1801-1882) puts all waters within the two hundred mile limit within the "admiralty and maritime jurisdiction of the United States." The purpose of the Fishery Act, however, was not to create such jurisdiction. The intent of Congress was

rather "to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources." 16 U.S.C. §1801(c)(1). The Isabel was not, therefore, in "waters within the admiralty and maritime jurisdiction of the United States."

Plaintiffs next argue that the injury occurred "in the United States" because the waters where this incident took place were "high seas," or alternatively that the Isabel was a United States vessel upon the "high seas" and therefore subject to the special admiralty jurisdiction. 18 U.S.C. §7. Because the underlying question before the Court is whether to assume jurisdiction over a foreign state, this determination must be made in compliance with the terms of the FSIA. Section 1604 of the FSIA provides that the immunity enjoyed by a sovereign state is to be interpreted according to any international agreements "to which the United States [was] a party at the time of enacting of the Act." The FSIA was enacted on October 21, 1976. One of the international agreements to which the United States was then a party is the Convention on the High Seas, TIAS 5200, 13 UST 2312, which became effective on September 30, 1962. The first article of the Convention provides that "[t]he term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a state." The territorial sea for The Bahamas, as for the United States, has a breadth of three miles. In view of the fact that the Convention specifically excludes territorial waters from the definition of the "high seas," the United States does not have jurisdiction over either the waters themselves or vessels upon those waters. The injury complained of, then, did

not occur "in the United States," and the exception in section 1605(a)(5) does not operate to remove The Bahamas' immunity from jurisdiction.

Plaintiffs have failed to show how The Bahamas fits into any of the exceptions to the immunity granted all foreign states by the FSIA. Accordingly, this Court lacks jurisdiction over this action and defendant's motion to dismiss for lack of jurisdiction is granted. An order consistent with this memorandum follows.

/s/ John Lewis Smith, Jr.
United States District Judge

Dated: Jan. 25, 1980

APPLICABLE STATUTES

28 U.S.C. §1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

Added Pub.L. 94-583, §2(a), Oct. 21, 1976, 90 Stat. 2891.

CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

28 U.S.C. §1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the

interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. §1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. §1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Added Pub.L. 94-583, §4(a), Oct. 21, 1976, 90 Stat. 2892.

28 U.S.C. §1605. General exceptions to the jurisdiction immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state

and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

16 U.S.C. §1801. Findings, purposes and policy

(a) Findings.—The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have

contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.

(7) A national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.

(b) Purposes.—It is therefore declared to be the purposes of the Congress in this chapter—

(1) to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive fishery management authority beyond such zone over such anadromous species and Continental Shelf fishery resources;

(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

(5) to establish Regional Fishery Management Councils to prepare, monitor, and

revise such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States; and

(6) to encourage the development by the United States fishing industry of fisheries which are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska.

(c) Policy. — It is further declared to be the policy of the Congress in this chapter—

(1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this chapter;

(2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this chapter;

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and

citizens; promotes efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; and is workable and effective;

(4) to permit foreign fishing consistent with the provisions of this chapter; and

(5) to support and encourage continued active United States efforts to obtain an internationally acceptable treaty, at the Third United Nations Conference on the Law of the Sea, which provides for effective conservation and management of fishery resources.

SUBCHAPTER I—FISHERY MANAGEMENT AUTHORITY OF THE UNITED STATES

16 U.S.C. §1811. Fishery conservation zone

There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

18 U.S.C. §7. Special maritime and territorial jurisdiction of the United States defined

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

18 U.S.C. §113. Attempt to commit murder or manslaughter

Except as provided in section 113 of this title, whoever, within the special maritime and territorial jurisdiction of the United States, attempts to commit murder or manslaughter, shall be fined not more than $1,000 or imprisoned not more than three years, or both. June 25, 1948, c. 645, 62 Stat. 756.

18 U.S.C. §1651. Piracy under law of nations

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life. June 25, 1948, c. 645, 62 Stat. 774.

Opposition

Office-Supreme Court, U.S.
FILED
AUG 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LAZARO PEREZ, *et al.*,
Petitioners,

v.

THE BAHAMAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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August 24, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the decision of the Court of Appeals below is in conflict with other courts or decides a question of federal law not resolved by this Court in holding that the allegedly tortious incident sued upon, which occurred in the territorial waters of The Bahamas and outside the Fishery Conservation and Management Zone of the United States, did *not* occur "in the United States" for purposes of the Foreign Sovereign Immunities Act of 1976.

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IN THE

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BRIEF FOR RESPONDENT IN OPPOSITION

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes set forth in the Appendix to the Petition, an additional portion of the Fishery Conservation and Management Act of 1976 and a United States Department of State Public Notice are involved. These are set forth in the Appendix hereto.

STATEMENT OF THE CASE

This action, originally filed in the Southern District of Florida on August 30, 1978, was transferred to the United States District Court for the District of Columbia pursuant to the venue provisions of the Foreign Sovereign

Immunities Act. 28 U.S.C. § 1391(f)(4) (1976). On January 25, 1980, the District Court dismissed the action, finding that it did not have jurisdiction over The Bahamas, a foreign state that was immune pursuant to the Foreign Sovereign Immunities Act. Petitioners' Appendix at 15-20. The decision of the District Court was appealed, and on April 28, 1981 the United States Court of Appeals for the District of Columbia Circuit affirmed. Petitioners' Appendix at 1-7.

ARGUMENT

1. Facts.

This action was brought for money damages for injuries sustained on August 11, 1978 when Bahamian governmental vessels fired on a fishing boat occupied by Cuban-American fishermen, which was fishing in Bahamian waters contrary to Bahamian law. The incident occurred in the territorial waters of The Bahamas, somewhat less than ½ a mile from The Great Isaac Cay, an island of The Bahamas. One of the fishermen on the boat, the minor plaintiff, was injured as a consequence of the shooting.

2. The Finding of the Court of Appeals that The Bahamas is Immune From Suit Pursuant to the Foreign Sovereign Immunities Act of 1976 does not Conflict With Any Other Circuit Court Decision nor does it Decide a Federal Question Unresolved by this Court.

a. *The incident occurred in The Bahamas and not in the United States.*

A crucial fact not in dispute in this litigation is that the incident sued upon "occurred less than a half mile from an island of The Bahamas, The Great Isaac Cay, in Bahamian territorial waters". Petitioners' Appendix at 5. The fact that this incident occurred within the territory of a foreign sovereign makes inapplicable all of the authority that Petitioners urge is in "conflict" with the opinion below.

Petitioners argue that the Court of Appeals erred in not finding that the instant case was one "for personal injury . . . *occurring in the United States* . . ." so as to fall within the exception to sovereign immunity afforded The Bahamas by the Foreign Sovereign Immunities Act of 1976. 28 U.S.C. § 1605(a)(5) (1976).

The Court of Appeals did no more than apply the plain meaning of the statute to the fact that the incident occurred in The Bahamas. No contrary case has been presented to this Court. *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979), a criminal case chiefly relied on by Petitioners, gives no aid whatsoever to Petitioners' argument. The question decided in that case, as stated by the court at the outset of its lengthy opinion, has nothing to do with the issues here:

> This case presents a consequential issue of international and domestic law . . .: whether a court of the United States can assert jurisdiction over persons arrested aboard a foreign vessel seized beyond the twelve-mile limit in violation of a particular provision of a treaty to which the United States and the foreign country are parties. [*Id.* at 865.]

Indeed, the instant case involves contrary facts—the assertion by a foreign state of its sovereignty over persons allegedly violating its laws in its own waters. The fact that the law permits the United States in certain circumstances to assert its criminal jurisdiction over persons on the high seas does not mean that foreign states are deprived of their sovereign immunity when attempting to enforce their laws *within their own waters.*

b. The incident did not occur within the Fishery Conservation Zone created by the Fishery Conservation and Management Act of 1976.

Petitioners argue that the shooting incident giving rise to this suit occurred "in the United States" because it allegedly occurred within the 200-mile Fishery Conserva-

tion Zone created by the Fishery Conservation and Management Act of 1976. 16 U.S.C. §§ 1801 *et seq.* (1976).

But, again, the undisputed facts will not support this argument. The Court of Appeals found as follows:

> The Secretary of State, pursuant to the authority given him by the Fishery Conservation Management Act, 16 U.S.C. § 1822 (1976), declared the limit of the Fishery Conservation Zone, insofar as The Bahamas is concerned, to be the median line halfway between the United States and The Bahamas. 42 Fed. Reg. 12937-38 (1977). It is undisputed that the events in this case took place well beyond the median line, in the territorial waters of The Bahamas and *outside the Fishery Conservation Zone.* This placement by the Secretary of State of the area in question beyond the United States Fishery Conservation Zone is dispositive of Appellant's principal contention. Appellant's argument that a tort committed in the Fishery Conservation Zone is a tort "occurring in the United States" is thus not supported by the facts of this case. [Petitioners' Appendix at 5-6, emphasis added]

> c. ***Assuming,* arguendo, *that the incident occurred within the Fishery Conservation Zone, it still would not have occurred in the United States.***

Because the Court of Appeals found that the shooting incident did *not* occur within the Fishery Conservation Zone, it did not rule on whether incidents such as the one sued upon, if occurring within the Zone, would occur "in the United States" within the meaning of the Foreign Sovereign Immunities Act. In *dictum* it suggested that its answer would be negative, relying on authority that should persuade this Court as well:

> It is doubtful that territory falling within the Fishery Conservation Zone suffices as territory of the United States within the meaning of the FSIA. The Fishery Conservation Management Act explicitly provides that it was Congress' intent to "maintain

without change the existing territorial or other ocean jurisdiction of the United States for *all purposes* other than the conservation and management of fishery resources." 16 U.S.C. § 1801(c)(1) (emphasis added). The language of the statute makes it clear that it was the intent of Congress to extend United States jurisdiction beyond our territorial seas only for the purpose of conserving and managing scarce marine resources. *See United States v. Postal*, 589 F.2d 862, 880 n.30 (5th Cir. 1979); Note, *Fishery Conservation & Management Act of 1976: An Accommodation of State, Federal and International Interests* 10 J. Int'l Law 703, 735 (1978). [Petitioners' Appendix at 4-5]

CONCLUSION

The Petition should be denied because the decision of the United States Court of Appeals for the District of Columbia Circuit, finding that the incident sued upon occurred in The Bahamas and not in the United States, correctly held that The Bahamas was immune from suit in United States courts. The decision is not in conflict with any other federal decision and adheres correctly to the Foreign Sovereign Immunities Act.

Respectfully submitted,

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August 24, 1981

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief for Respondent in Opposition were served by United States mail, postage prepaid, this 24 day of August, 1981 on Arnold R. Ginsberg, 410 Concord Building, 66 W. Flagler Street, Miami, Florida 33130, attorney for Petitioners.

William A. Bradford, Jr.

APPENDIX

APPENDIX

The Fishery Conservation and Management Act of 1976 (portions in addition to these in Petitioners' Appendix)

16 U.S.C. § 1822. International fishery agreements

(a) Negotiations.—The Secretary of State—

(1) shall renegotiate treaties as provided for in subsection (b) of this section;

(2) shall negotiate governing international fishery agreements described in section 1821(c) of this title;

(3) may negotiate boundary agreements as provided for in subsection (d) of this section;

(4) shall, upon the request of and in cooperation with the Secretary, initiate and conduct negotiations for the purpose of entering into international fishery agreements—

(A) which allow fishing vessels of the United States equitable access to fish over which foreign nations assert exclusive fishery management authority, and

(B) which provide for the conservation and management of anadromous species and highly migratory species; and

(5) may enter into such other negotiations, not prohibited by subsection (c) of this section, as may be necessary and appropriate to further the purposes, policy, and provisions of this chapter.

(b) Treaty renegotiation.—The Secretary of State, in cooperation with the Secretary, shall initiate, promptly after April 13, 1976, the renegotiation of any treaty which pertains to fishing within the fishery conservation

zone (or within the area that will constitute such zone after February 28, 1977), or for anadromous species or Continental Shelf fishery resources beyond such zone or area, and which is in any manner inconsistent with the purposes, policy, or provisions of this chapter, in order to conform such treaty to such purposes, policy, and provisions. It is the sense of Congress that the United States shall withdraw from any such treaty, in accordance with its provisions, if such treaty is not so renegotiated within a reasonable period of time after April 13, 1976.

(c) International fishery agreements.—No international fishery agreement (other than a treaty) which pertains to foreign fishing within the fishery conservation zone (or within the area that will constitute such zone after February 28, 1977), or for anadromous species or Continental Shelf fishery resources beyond such zone or area—

(1) which is in effect on June 1, 1976, may thereafter be renewed, extended, or amended; or

(2) may be entered into after May 31, 1976;

by the United States unless it is in accordance with the provisions of section 1821(c) of this title.

(d) Boundary negotiations.—The Secretary of State, in cooperation with the Secretary, may initiate and conduct negotiations with any adjacent or opposite foreign nation to establish the boundaries of the fishery conservation zone of the United States in relation to any such nation.

(e) Nonrecognition.—It is the sense of the Congress that the United States Government shall not recognize the claim of any foreign nation to a fishery conservation zone (or the equivalent) beyond such nation's territorial

sea, to the extent that such sea is recognized by the United States, if such nation—

(1) fails to consider and take into account traditional fishing activity of fishing vessels of the United States;

(2) fails to recognize and accept that highly migratory species are to be managed by applicable international fishery agreements, whether or not such nation is a party to any such agreement; or

(3) imposes on fishing vessels of the United States any conditions or restrictions which are unrelated to fishery conservation and management.

United States Department of State Public Notice 526, 42 Fed. Reg. 12937 (1977)

FISHERY CONSERVATION ZONE

Notice of Limits

The Fishery Conservation and Management Act of 1976 establishes a fishery conservation zone contiguous to the territorial sea of the United States, effective March 1, 1977, the outer boundary of which is a line drawn in such a manner that each point on it is 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

The Government of the United States of America has been, is, and will be engaged in consultations and negotiations with the governments of neighboring countries concerning the delimitation of areas subject to the respective jurisdiction of the United States and of these countries.

The limits of the fishery conservation zone of the United States as set forth below are intended to be without prejudice to any negotiations with these countries

or to any positions which may have been or may be adopted respecting the limits of maritime jurisdiction in such areas.

Therefore, the Department of State on behalf of the Government of the United States of America hereby announces the limits of the fishery conservation zone of the United States of America, within which the United States will exercise its exclusive fishery management authority as set forth in the Fishery Conservation and Management Act of 1976, pending the establishment of permanent maritime boundaries by mutual agreement.

Publication of a notice on this subject which is effective immediately upon publication is necessary to effectively exercise the foreign affairs responsibility of the Department of State. (See Title 5, U.S.C., 553(a)(1) and (b)(B)).

The North American coordinates in this notice relate to the Clarke 1866 Ellipsoid and the North American 1927 datum for the contiguous United States.

Straight line in this notice means a geodetic line.

[Here follows a list of latitude and longitude coordinates.]